84-1468 (2)

Office-Supreme Court, U.S.
FILED
MAR 1 1985
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

ROBERT L. DESEYN,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY
DISTRICT,
Respondent.

SUBSTITUTE APPENDIX FOR PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

---

MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Petitioner

---

24 pp

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT L. DESEYN	)	**JUDGE**
	(	**ALVIN I. KRENZLER**
Plaintiff	)	
-vs-	)	**CASE NO. C82-3018A**
MUSKINGUM WATERSHED	)	
CONSERVANCY DISTRICT	)	**MEMORANDUM OF**
	)	**OPINION AND ORDER**
Defendant	)	

Plaintiff filed this action on November 3, 1983 *[Sic]*. In his complaint, plaintiff is asserting causes of action alleged to arise under 42 U.S.C §1983, the Fourteenth Amendment to the United States Constitution, and the Refuse Act of 1899, 33 U.S.C §407, in addition to various pendent state claims.

The defendant in this action, the Muskingum Watershed Conservancy District, was organized as a conservancy district under the authority of Capter *[Sic]* 61 of the Ohio Revised Code. Pursuant to O.R.C §6101.03, the defendant is a political subdivision and a public corporation of the state of Ohio.

Generally, the plaintiff alleges in his complaint that he owns a residential dwelling located on land leased from the defendant in an area referred to as the 'North Shore area adjacent to Atwood Lake' (North Shore area). Plaintiff alleges that the defendant is about to commence oil and gas drilling in the North Shore area, and plaintiff is seeking to enjoin that activity.

On November 23, 1983 *[Sic]*,the defendant filed a motion to dismiss plaintiff's complaint which is

presently pending before the Court. In its motion, the defendant asserts that any oil and gas drilling in the North Shore area will not be conducted by the defendant but will be conducted by a third party under an oil and gas lease entered into prior to when plaintiff obtained his lease from the defendant. Further, plaintiff's lease expressly states that it is subject to any existing oil and gas leases. Defendant also asserts in its motion to dismiss that it is not a person within the meaning of 42 U.S.C.§1983, and that plaintiff does not have standing to sue under 33 U.S.C. §407.

The defendant has attached exhibits and affidavits to its motion to dismiss. Therefore, pursuant to Fed. R. Civ. P. 12(b), the defendant's motion will be treated as a motion for summary judgement under Fed. R. Civ. P. 56.

> Fed R. Civ. P. 56 provides in pertinent part:
>
> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

The undisputed facts in this case, established by the pleadings, exhibits and affidavits of the parties are as follows. The defendant owns the real estate in the North Shore area at issue in this case. On June 1, 1967, defendant entered into a oil and gas lease with the Oxford Oil Company, granting the company the right to drill for oil and gas on lands which encompass that presently occupied by the plaintiff.

On August 1, 1969, a Dr. Frank Schirack entered into a cottage site lease with the defendant with respect to the lot presently occupied by the plaintiff. The lease was for a term of one year with the right to renew it each year, subject to certain conditions, for a total period of fourteen years. The lease expressly provided that it was subject to '[a]ll existing oil and gas leases.' On March 1, 1970, Dr. Schirack assigned the lease to the plaintiff, Robert L. Deseyn. Plaintiff, at the same time, purchased the cottage Dr. Schirack had constructed on the site. The plaintiff continues to occupy the site at the present time. Plaintiff brought this action in November, 1982 when he personally observed three gas drilling sites on real estate owned by the defendant in the North Shore area.

Plaintiff's first claim is alleged to arise under 42 U.S.C. §1983. Plaintiff alleges, in this claim, that the defendant's actions regarding oil and gas drilling activities in the North Shore area have been arbitrary, capricious and unreasonable and thus a violation of due process of law.

In **Board of Regents v. Roth**, 408 U.S. 564 (1972), the Supreme Court held that the requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. The Court went on to hold:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In the present case, the plaintiff's property rights are defined by the lease agreement covering the property at issue here. The plaintiff has a property interest in the land only to the extent such an interest is granted by the lease. The lease agreement specifically provides that plaintiff's interest in the property is subject to any prior oil and gas leases. The oil and gas lease at issue here was entered into on June 1, 1967. The lease plaintiff took by assignment was entered into on August 1, 1969. Accordingly, the plaintiff did not have a property interest in this land which would give rise to a right to due process concerning oil and gas drilling activities in the North Shore area, and, therefore, the plaintiff could not violate such a right. Thus, plaintiff's claim under 42 U.S.C. §1983, alleging a violation of due process is hereby dismissed.

Plaintiff's second claim, that oil and gas drilling in the North Shore area will diminish the value of plaintiff's property and will, thus, constitute an uncompensated taking of plaintiff's property in violation of the Fourteenth Amendment, is similarly defeated by the lease at issue here. The source of any property interest the plaintiff might have in the land at issue here is the lease. The lease, by providing that plaintiff's property interest is subject to any preexisting oil and gas leases, never gave the plaintiff the property interest he now claims will be taken by the drilling activity. **Board of Regents** v. **Roth, supra.**

Accordingly, because the property interest plaintiff claims will be taken was never given to him in the first place, the plaintiff's claim which is based on an uncompensated taking in violation of the Fourteenth

Amendment is hereby dismissed. This is not to say, however, that the plaintiff will not have a state tort action against the driller if the drilling should damage those property interests that plaintiff does have in the land.

Plaintiff's third claim is brought under the Refuse Act of 1899, 33 U.S.C. §407. Plaintiff alleges that the drilling activity will produce refuse matter which will flow in to the water reservoir of Atwood Lake.

The Refuse Act provides in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed.

In his complaint, the plaintiff does not specify what types of refuse matter the drilling will produce which might impede or obstruct navigation. However, even assuming that such matter may be produced, 33 U.S.C. §407 does not create a private right of action to enforce the statute. **City of Evansville, Ind.** v **Kentucky Liquid Recycling**, 604 F. 2nd 1008 (7th Cir. 1979). Accordingly, the plaintiff does not have a standing to assert a cause of action under 33 U.S.C. §407 and this claim must, therefore, be dismissed.

The remainder of plaintiff's claims arise under state law and are only before the Court under the doctrine of pendent jurisdiction. The Court having dismissed the plaintiff's federal claims prior to trial, plaintiff's pendent state claims are better resolved in a state court and are therefore dismissed. **United Mine Workers** v. **Gibb**, 330 U.S. 258 (1947).

Accordingly, the defendant's motion to dismiss is hereby granted.

IT IS SO ORDERED.

(s)

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT L. DESEYN	)	**JUDGE ALVIN I. KRENZLER**
Plaintiff	)	
-vs-	)	**CASE NO. C82-3018A**
MUSKINGUM WATERSHED CONSERVANCY DISTRICT	)	
	)	**JUDGEMENT ENTRY**
Defendant	)	

On May 18, 1983 this Court entered its Memorandum of Opinion and Order granting the defendant's motion to dismiss this action. Accordingly,

IT IS ORDERED that this action is hereby dismissed. Plaintiff is to pay all costs.

IT IS SO ORDERED.

(s)

UNITED STATES DISTRICT COURT

NOT FOR PUBLICATION

NO. 83-3400

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBL

Sixth Circuit Rule 24 limits citation to specific situations
Rule 24 before citing in a proceeding in a court in the Si
cited, a copy must be served on other parties and the Cou
This notice is to be prominently displayed if this decision is

ROBERT L. DESEYN	)	
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	**APPEAL FROM**
	)	**THE UNITED STATES**
	)	**DISTRICT COURT**
	)	**FOR THE**
MUSKINGUM WATERSHED	)	**NORTHERN DISTRICT**
CONSERVANCY DISTRICT	)	**OF OHIO**
	)	
Defendant-Appellee.	)	

BEFORE: EDWARDS and WELLFORD, Circuit Judges, and CHURCHILL, District Judge.*

PER CURIAM. Plaintiff Deseyn owns a house and water well located in a Conservancy District in Tuscarawas County, Ohio. The property upon which his house and water well are located is leased from defendant Conservancy District. Plaintiff acquired the lease by assignment from a Dr. Frank Schirack and subsequently purchased the residence from him and continued to lease the real estate from the Conservancy District.

Defendant is an Ohio Conservancy District authorized under Ohio Revised Code Chapter 6101 to operate and maintain the lake and surrounding property on which many cottages have been built. Defendant Conservancy District is a political subdivision of the State of Ohio.

BEST AVAILABLE COPY

Sometime in 1982 plaintiff Deseyn noticed three oil and gas well drilling sites in an area around his home (none closer than 600 feet to his property). Deseyn then filed this action for an injunction, declaratory judg - ment, damages, attorneys' fees, and costs, alleging irreparable damage and injury to himself and to the market value and peaceable enjoyment of his home and water well. Among other things, he alleges violation of 42 U.S.C. §1983 (1970) for arbitrary, capricious, and unreasonable actions taken without due process of law, and under the Fourteenth Amendment for a "taking" of his home and water well without compensation and due process.

Plaintiff also asserted a cause of action under 33 U.S.C. § 407.[1] Dismissal by the district court of this asserted private cause of action was proper. **See City of Evansville** v. **Kentucky Liquid Recycling**, 604 F. 2nd 1008 (7th Cir. 1978). As stated by another court:

> The rivers and Harbors Act is limited by its terms to enforcement by the United States Attorneys. The majority of courts, and the courts of this circuit that have addressed this issue, have held that the Act precludes private suits and have thus refused to find an implied private cause of action. **Red Star Towing and Transp. Co.** v. **Department of Transportation**, 423 F.2nd 104, 105 (3rd Cir. 1970); **Township of Long Beach** v. **City of New York**, 445 F. Supp. 1203, 1211-12 (D.N.J. 1978); **see Connecticut Action Now, Inc.** v. **Roberts Plating Co.**, 457 F.2nd 81,85-87 (2nd Cir. 1972); **Parcell** v. **Shell Oil Co.**, 421 F. Supp. 1275, 1279-80 (D.Conn. 1976). **affirmed**, 573 F.2nd 1289 (2nd Cir. 1977).

National Sea Clammers Ass'n. v. **City of New York**, 616 F.2nd 1222, 1232 (2nd Cir. *[Sic]* 1980).

---

[1]. This Act is known as the Rivers and Harbors Act (Refuse Act).

It appears that the 'cottage site lease' (attached to the complaint) which was assigned to Deseyn was entered into by his predecessor on August 1, 1969, and contains a clause which expressly provides that the lease is subject to 'all existing oil and gas leases and utility rights-of-way thereunto pertaining.' The district court, on review of defendant's motion for summary judgement, found that the oil and gas drilling lease under attack by Deseyn was entered into June 1, 1967, over two years prior to Deseyn's predecessor's acquisition of his property rights in the lease and cottage.

We AFFIRM the district court's decision for defendants since it sets out, as a matter of law, the rights of the parties based on the uncontested facts that were before it, recognizing, at the same time, that plaintiff may at some later time have a cause of action if future drilling demonstrably damages his property interests.

NO. 83-3400

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT L. DESEYN)

Plaintiff-Appellant,)

-vs-)

MUSKINGUM WATERSHED)
CONSERVANCY DISTRICT)

Defendant-Appellee.)

FILED
DEC 7 1984
JOHN P. HEHMAN, Clerk

ORDER

Before: EDWARDS and WELLFORD, Circuit Judges; and CHURCHILL, District Judge.*

The district court, on review of defendant's motion to dismiss, treated as a motion for summary judgement, found that the oil and gas drilling lease under attack by Deseyn was entered into June 1, 1967, over two years prior to Deseyn's predecessor's acquisition of his property rights in the lease and cottage. Even if considered as a *sua sponte* summary judgement action without the requisite notice, plaintiff has not demonstrated prejudice in this procedure. Plaintiff has never demonstrated any basis to challenge the validity of the 1967 lease. **See Harrington** v. **Vandalia-Butler Board of Education**, 649 F.2nd 434, 436.

Upon consideration of plaintiff's petition for rehearing, we again affirm the district court's decision

---

* The Honorable James P. Churchill, U.S. District Court for the Eastern District of Michigan, sitting by designation.

for the reasons heretofore stated in the court's *per curiam* opinion.

ENTERED BY ORDER OF THE COURT

(s)

Clerk

CONSTITUTIONAL PROVISIONS, STATUTES AND PROCEDURAL RULES INVOLVED

The Due process Clause of the Fourteenth Amendment provides:

> . . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Bill of Rights, Article V, provides:

> . . . nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil . . . case.

28 U.S.C. §1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief

under any Act of Congress providing for the protection of civil rights,

. . . .

28 U.S.C. §2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

33 U.S.C. §407 provides:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or

out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or

by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed:

33 U.S.C. §413 provides:

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be

transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, and person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same.

42 U.S.C. §1983, enacted as §1 of the Civil Rights Act of 1871, 17 Stat. 13, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 12(b), FRCP, provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading

thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may

assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 15(a), FRCP, provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . .

Rule 20(a), FRCP, provides:

Permissive Joinder. All persons

may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Rule 23, FRCP, provides:

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;....

Rule 56(c), FRCP, provides:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.